Supreme Court, U. S.
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IN THE
Supreme Court of the United States

No. 77-1375

AUGUSTINE DOZAL MOROYOQUI,
Petitioner,

versus

THE UNITED STATES OF AMERICA,
Respondent,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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NO.

AUGUSTINE DOZAL MOROYOQUI,

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THE UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

Petitioner respectfully prays a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 27, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at ..... F.2d ..... a copy of which appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 27, 1977. A Petition for Rehearing was timely filed on behalf of Defendant-Appellant Moroyoqui and an order denying said Petition was entered on January 31, 1978. A Motion for Stay of Issuance of Mandate and for Extension of Time Within Which to Petition for Rehearing was also timely filed on behalf of Plaintiff-Appellee, the United States of America and an order granting said motion was entered on January 13, 1978, wherein the mandate in this case was stayed and the time for filing Appellee's Petition for Rehearing was extended to and including February 9, 1978. The Petition for Rehearing was filed by the United States of America on February 9, 1978, and an Order denying the Petition for Rehearing was entered on February 28, 1978. This Petition for Certiorari was timely filed within thirty (30) days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254(1).

QUESTION PRESENTED

Whether the conduct of the Prosecutor, in placing prejudicial testimony before the jury which required the declaration of a mistrial, amounted to gross negligence which constituted prosecutorial overreaching and thus deprived Appellant of his valued right to have his trial completed by a particular tribunal, in violation of his rights under the double jeopardy clause of the Fifth Amendment.

CONSTITUTIONAL PROVISION INVOLVED

The following portion of the Fifth Amendment of the Constitution of the United States:

> " . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;"

STATEMENT OF FACTS

This is an appeal of a criminal prosecution wherein Petitioner was put on trial in the United States District Court for the District of Arizona for violation of 21 U.S.C. 841 (a)(1) and 21 U.S.C. 846. During the examination of the government's final witness, the Prosecutor elicited testimony which was prejudicial to Petitioner. Defense counsel's request for mistrial was granted. Prior to a second trial, Petitioner filed a Motion to Dismiss Because of Prior Jeopardy, claiming the Prosecutor's conduct was intentional misconduct or *gross negligence* amounting to Prosecutorial overreaching, thus, barring further prosecution. After a hearing the Trial Court found no intentional misconduct and set the case for a second trial over Petitioner's objection, even though Petitioner filed Notice of Appeal.

After the commencement of a second trial, Petitioner entered a guilty plea, pursuant to a plea bargaining arrangement, and was sentenced to three years in the penitentiary.

On appeal, the Court of Appeals for the Ninth Circuit reversed, holding that the lower court had no jurisdiction to proceed with the second trial or the guilty plea. The Court of Appeals accepted the lower court's findings of no intentional misconduct and no overreaching, a decision which conceivably permits reprosecution. The Trial Court and the Appellate Court failed to address the question of whether the Prosecutor's conduct was so grossly negligent as to constitute overreaching, wherein jeopardy attached barring further prosecution.

A close scrutiny of the sequence of certain events prior to and during the first trial clearly reveals "*gross negligence*," if not intentional misconduct, on the part of the Prosecutor. Prior to the trial, the Prosecutor assured defense counsel that he would not attempt to introduce evidence of extrinsic offenses or collateral matters. This agreement was announced to the Court and ratified by the Court. During the trial, the Prosecutor informed defense counsel that he would deviate from the ruling on Petitioner's Motion in Limine and would attempt to introduce evidence of a collateral offense. A chambers conference was held and the Court again cautioned the Prosecutor not to violate the

order on the Motion in Limine. Notwithstanding the Prosecutor's agreement, the order of the Court, and the later admonition of the Court not to attempt to introduce evidence of collateral matters, the Prosecutor called his final witness for the sole purpose of eliciting the following testimony:

"Q. Have you passed that residence before?

A. Yes, sir, I have.

Q. When was that?

A. *On various occasions during other narcotics investigations*, I became familiar with the residence.

Q. At what point in time did you pass by the residence?

A. What time that day?

Q. *No. How long before this date had you passed in front of that residence?*

A. Occasionally for probably five or six months.

MR. PATCHEN: Your Honor, I think this is irrelevant and I move for a mistrial."

(TR-152) (Emphasis added.)

The Prosecutor had no reasonable basis for asking the above questions. The residence of Petitioner was not at issue, had nothing to do with the alleged violation of law, and had previously been testified to no less than ten times. The issue of Petitioner's residence was wholly irrelevant.

A reading of the entire transcript prior to the above testimony reveals that the previous government witnesses had testified to facts which destroyed any hope of the government obtaining a conviction on the conspiracy count and which certainly created a reasonable doubt as to Petitioner's guilt on the delivery count.

Petitioner was forced to request a mistrial when he would have preferred to have his guilt or innocence determined by the first trial jury.

REASON FOR GRANTING THE WRIT

Whether The Conduct Of The Prosecutor, In Placing Prejudicial Testimony Before The Jury Which Required The Declaration Of A Mistrial Amounted To Gross Negligence Which Constituted Prosecutorial Overreaching And Thus Deprived Appellant Of His Valued Right To Have His Trial Completed By A Particular Tribunal In Violation Of His Rights Under The Double Jeopardy Clause Of The Fifth Amendment.

Central to the above Point of Error is the contention that if the Prosecutor did not act intentionally or in bad faith, the Prosecutor was "grossly negligent." The Court of Appeals for the Ninth Circuit overlooked in its opinion this important contention.

The Appellate Court adopted the Trial Court's conclusion that the Prosecutor did not act "knowingly" or in "bad faith." Nowhere does the opinion of the Court of Appeals address the issue as to whether or not the conduct of the Prosecutor was grossly negligent.

Petitioner relies on the case of *United States v. Kessler*, 530 F.2d 1246 (5th Cir. 1976) to support the proposition that grossly negligent conduct can be "overreaching;" and the Prosecutor does not necessarily have to act knowingly or in bad faith to overreach. The Eighth Circuit has also adopted the gross negligence standard. *United States v. Martin* 561 F.2d 135 (8th Cir. 1977).

Thus, within a year of the Supreme Court landmark case of *United States v. Dinitz*, 424 U.S. 600 (1976) two Circuits have adopted the gross negligence standard and concluded "to find prosecutorial overreaching the Government must have, through *gross negligence* or intentional misconduct caused aggravated circumstances to develop . . . " *Kessler, supra* at 1256 (Emphasis added.)

This Court should consider not only whether the Prosecutor acted knowingly or in bad faith, but also should determine whether the conduct of the Prosecutor was grossly negligent. Careful consideration of the Prosecutor's conduct will lead this Court to conclude that the Prosecutor was grossly negligent.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

I, CLARENCE D. MOYERS, a member of the Bar of the Supreme Court of the United States, hereby certify that on the ..... day of March, 1978, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States by mailing a copy thereof to the office of Jamie Boyd and by mailing three copies in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

_____
CLARENCE D. MOYERS

APPENDIX

FILED
December 27, 1977
Emil E. Melfi, Jr.
Clerk, U.S. Court of
Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AUGUSTINE DOZAL MOROYOQUI,
Defendant/Appellant,

vs.

UNITED STATES OF AMERICA,
Plaintiff/Appellee,

NO. 77-1505
OPINION

Appeal from the United States District Court
for the District of Arizona

Before: CHAMBERS and SNEED, Circuit Judges, and SOLOMON,* District Judge.

SNEED, Circuit Judge:

In 1976 Petitioner Moroyoqui was put on trial on charges of conspiracy to possess with intent to distribute cocaine and with distribution of cocaine, in violation of 21 U.S.C. §§ 841 (a)(1) and 846. During the examination of a government witness, information was brought out under questioning by the prosecution which was prejudicial to the petitioner. The court granted defense counsel's request for a mistrial.

*Hon. Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

Before a second trial was held, petitioner moved for dismissal, claiming that he was forced to demand a mistrial because of overreaching and misconduct by the prosecutor and that, under those circumstances, requiring him to undergo a second trial would violate his rights under the Double Jeopardy Clause of the Fifth Amendment. After a hearing on the matter the trial judge denied the motion, concluding that neither the prosecutor nor the witness had "knowingly" introduced the prejudicial information. Petitioner then sought permission to appeal the denial. Apparently aware both of the Ninth Circuit's decision in *United v. Young*, 544 F.2d 415 (1976), holding such denials unappealable, and of the pendency before the Supreme Court of *Abney v. United States*, 97 S.Ct. 2035 (1977), the Court and petitioner agreed that the appeal would be "lodged" but no attempt would be made to pursue it at that time. (Transcript p. 142). Shortly after the commencement of the second trial, petitioner entered a guilty plea, pursuant to a plea bargaining arrangement. Petitioner was thereupon sentenced to a three-year term. He now appeals, alleging, among other claims, that the Double Jeopardy clause properly barred a second trial. We reverse and set aside the appellant's conviction.

At the threshold we are met with the Government's contention that by entering his guilty plea petitioner waived the right to raise the double jeopardy issue on appeal. We disagree. Where the state is precluded by a constitutional claim from trying the defendant at all, his conviction must be set aside even if it was obtained pursuant to a guilty plea. *Menna v. New York*, 423 U.S. 61, 62 (1975); *United States v. O'Donnell*, 539 F.2d 1233, 1236-37 (9th Cir. 1976). In *Menna* the defendant did not attempt to appeal the dismisal of his double jeopardy defense until after he was sentenced. Nonetheless the Court held that a guilty plea "does not waive a claim that — judged on its face — the charge is one which the State may not constitutionally prosecute." 423 U.S. at 63, n.2. This conclusion is equally true where, as we conclude was the case here, the defendant was improperly denied his right to appeal. Thus

petitioner's claim of double jeopardy is properly before us.

The Supreme Court held in *Abney* that an order denying a motion to dismiss on double jeopardy grounds is a final decision and therefore appealable under 28 U.S.C. § 1291. *Abney* was decided during the pendency of this appeal. It is settled that "a change in law will be given effect while a case is on direct review," *Linkletter v. Walker*, 381 U.S. 618, 627 (1965); *United States v. Schooner Peggy*, 1 Cranch 103 (1801). In *Carafas v. LaVallee*, 391, U.S. 234 (1968), for example, the Supreme Court held that a constitutional decision would apply even to a case in which the court of appeals had already ruled, but which was "not concluded at the time" because a petition for certiorari had been filed, *id.* at 241. *A fortiori*, we are bound by a decision handed down during the pendency of this appeal.

Applying *Abney* to our case, then, it is clear that when petitioner "lodged" his appeal from the trial court's denial of his claim, jurisdiction was conferred upon the court of appeals. As a consequence the trial court was without power to proceed with the trial. Under the unusual circumstances of this case, the failure to pursue the appeal does not alter this result. We must, therefore, set aside the appellant's conviction.

We hold, however, that reprosecution is not barred by the Double Jeopardy Clause. A motion for a mistrial by the defendant normally serves to remove any barrier to reprosecution. Such is not the case, however, when the prosecutor has through bad faith or overreaching "goaded" the defendant into requesting a mistrial. *Lee v. United States*, U.S. , 97 S.Ct. 2141 (1977); *United States v. Dinitz*, 423 U.S. 600, 611 (1976); *United States v. Jorn*, 400 U.S. 470, 485 (1971). Petitioner alleges that here the prosecutor intentionally elicited prejudicial information from a witness, and this conduct was sufficient to bar prosecution.

The trial judge rejected this allegation. After hearing testimony from the government witness and from the prosecutor, she concluded that the prosecutor had

not acted knowingly. The judge who hears the witnesses is in a better position than is a reviewing court to weigh their testimony and evaluate their credibility. We are not persuaded that the trial judge's findings concerning the witnesses' credibility and intent are "clearly erroneous." Nor do we believe that his conclusion that the conduct of the prosecutor and witness did not constitute "bad faith" or "overreaching" is erroneous.

Inasmuch as reprosecution is not inevitable, although constitutionally possible, our disposition of this case is merely to reverse and set aside the appellant's conviction.

REVERSED.